United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1599

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Docket No. 74-1599

Plaintiff-Appellee,

v.

WILSON O. DAVILA,

Defendant-Appellant.

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BRIEF ON APPEAL
OF DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

This is an appeal from a jury verdict finding the defendant-appellant guilty of three counts of an indictment in the United States District Court for the Southern District of New York before Honorable Harold R. Tyler, Jr. on March 13, 1974, after a trial of the allegations contained in the indictment as handed down by the Grand Jury containing five counts.

The trial was commenced on March 11th, and proceeded through the 12th and terminated on the 13th of March, 1974 in a jury verdict on the first three counts of the five count indictment. The fourth count was withdrawn and the fifth count was dismissed, on motion, during the course of the trial.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The question presented upon this appeal is the application of the so-called "weight of evidence" rule. On the weight of the evidence, could the jury reasonably have found the defendant guilty, or to put it another way, did the Government show in its case the defendant-appellant guilty beyond a reasonable doubt.

STATEMENT OF THE CASE

It is claimed in the indictment that on or about from the 1st day of July, 1973 and continuously thereafter, up to and including the date of filing of the indictment, the defendant-appellant, Wilson O. Davila, together with another named defendant, Archie Van Putten, knowingly and unlawfully and intentionally combined, conspired and confederated together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code in that they would distribute and possess with an intent to distribute schedule I and II narcotic drug controlled substances, to wit: cocaine hydrochloride. Count One of the indictment concerned itself with the so-called

overt acts in the furtherance and pursuance of the said conspiracy alleging in substance that on the 30th day of July, 1973, the defendant-appellant, Wilson O. Davila, met with the defendant, Archie Van Putten. It is further alleged that the defendant, Archie Van Putten, entered into an automobile in a certain parking area of the Bronx-Whitestone Motel in the County of the Bronx, New York on the said July 30th, 1973, and further that the defendant-appellant, Wilson O. Davila, went to an adjacent parking area to the Bronx-Whitestone Motel in the County of the Bronx, New York.

The second Count of the allegation alleges that on the 30th day of July, 1973, the defendant, Archie Van Putten, together with the defendant-appellant, Wilson O. Davila, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute approximately 1.94 grams of cocaine hydrochloride

The third Count charges that on or about the 30th day of July, 1973, the defendant, Archie Van Putten, and the defendant-appellant, Wilson O. Davila, did unlawfully, intentionally and knowingly distribute approximately 490.4 grams of cocaine

hydrochloride.

The fourth and fifth Counts alleged further substantive counts of unlawful possession with the intent to distribute, which counts, however, were subsequently withdrawn or dismissed.

The indictment was filed in the United States District Court for the Southern District on the 23rd day of November, 1973.

On December 3, 1973, the defendants entered a plea of Not Guilty, at which time the case was assigned to Honorable Harold R. Tyler, Jr.

On December 26, 1973, the defendant, Archie Van Putten, withdrew the plea of Not Guilty to enter a plea of Guilty to Count One only of the indictment. Sentence was adjourned to February 8, 1974 and then further adjourned to March 15, 1974.

The jury trial of the defendant-appellant, Wilson O. Davila, was begun on March 11, 1974. The trial continued through March 12th, at which time Counts Four and Five were withdrawn and dismissed on defendant's counsel's motion, and on March 13, 1974 the trial was concluded with a jury verdict finding that defendant-appellant was Guilty on Counts One, Two and Three.

Sentence was adjourned to April 26, 1974 at which time, before Judge Tyler, the defendant-appellant, was committed to the custody of the Attorney-General for imprisonment as a young adult offender, to be handled under and pursuant to the Federal Youth Correction Act as a young adult offender (Title 18, U.S.C., Sections 5005-5024 and 4209).

THE TRIAL

After openings by the Government and the defendant-appellant, the Government proceeded to present its case by calling its first witness, Special Agent Donald Ferrarone, of the Department of Justice Drug Enforcement Administration (pages T13 through 59.)

Thereafter the Government presented expert witness, a forensic chemist, one Dennis Walczewski, employed by the United States Department of Justice Drug Enforcement Administration (T60 through 67). Thereafter, a third Government witness, a supervisor agent with the United States Department of Justice Drug Enforcement Administration, was called and testified on behalf of the Government (T76 through 92.)

All the above witnesses were called and testified to

their dealings with the co-defendant, Archie Van Putten, or in connection with the examination and analysis of the substance. None of the testimony elicited from the above witnesses dealt directly with the defendant-appellant, Wilson O. Davila, so far as personal contract between the witnesses and the defendant-appellant.

Thereafter, on the second day of trial, the Government in its direct case called the co-defendant, Archie Van Putten, as its witness as an accomplice. This witness' testimony, on direct and cross examination, appears in the transcript at pages 96 through 144 inclusive.

Thereafter, the Government rested its case against this defendant-appellant.

The defense presented two witnesses. The first, Gilberto Rodriguez, testified with respect to his knowledge and acquaintanceship with the defendant-appellant, and the co-defendant, Archie Van Putten, and the circumstances in which he introduced the defendant-appellant to the co-defendant, Archie Van Putten. (T149-153).

Finally, the defendant-appellant, Wilson O. Davila,

testified in his own behalf. (T154-177)

Finally, the defense introduced into evidence the certified copy of the Veterans' Hospital summary and discharge record. (A54-55) (T203)

Thereafter, the defense rested.

After closing summations by the defense and the Government, the Court charged the jury. (A13-45)

Thereafter, the jury reached a verdict on Count Three (A49-50), and then a subsequent verdict on Counts One and Two (A249), finding the defendant-appellant guilty on all counts.

After the jury had been properly polled and discharged, the defendant-appellant moved to set aside the verdict as being inconsistent with the law and the weight of the evidence, and requesting a directed verdict of acquittal, which was denied by the trial judge. (T150)

POINT I

WAS THE WEIGHT OF EVIDENCE PRESENTED BY THE GOVERNMENT SUFFICIENT TO SUPPORT THE VERDICT AS A MATTER OF LAW AND HAS THE GOVERNMENT SHOWN THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT?

It is respectfully submitted that the jury's verdict against the defendant-appellant rested upon the evidence as presented by the Government from the accomplice witness' testimony of the defendant, Archie Van Putten. This testimony was the sole and only evidence that was presented connecting the defendant-appellant directly with the so-called conspiracy and acts as charged in the indictment. In point of fact, nowhere in any of the testimony or evidence as introduced by the Government is the defendant-appellant ever directly connected with or be possessed with the transaction as charged and complained of, nor is he shown to be in the company of the defendant, Archie Van Putten.

Rather, the sole and only time that the defendant-appellant is connected with the defendant, Archie Van Putten, is by the testimony of the defendant, Archie Van Putten, himself.

It is to that very testimony that the thrust of this argument on appeal is made. It is respectfully submitted that this

accomplice-witness' testimony was riddled with inconsistencies and inaccuracies that were continually changed and corrected throughout the course of the witness' cross-examination and re-direct examination.

The first of these inconsistencies was shown on the cross-examination when the witness was asked how long he had known the defendant-appellant, Wilson O. Davila (T104ff). It is to be noted that the witness was quite clear in answering that he knew the defendant-appellant from March of 1973 through July, and further that he had seen and observed the defendant-appellant as often as once or twice a week at various dances and clubs through that period. (T104-106)

In point of fact, the defendant-appellant was confined as a patient in the Veterans' Hospital in East Orange, New Jersey for that entire period, from February through May, as is evidenced by defendant-appellant's Exhibit A introduced into evidence (A54-55).

In point of fact, the defendant's witness, Gilberto Rodriguez, in his direct testimony, stated that he introduced the defendant-appellant to the defendant, Archie Van Putten, which is confirmed by the defendant Van Putten himself (T110). This witness,

Rodriguez, makes this first and initial introduction to have taken place in June of 1973. (T151)

It was to be further noted that this defendant, Van Putten, had already entered a plea of Guilty to a related charge in connection with this indictment, and was awaiting sentence before the very trial judge at the time he testified against the defendant-appellant in the instant action. (T96-97) (T142-143)

The testimony of the defendant, Archie Van Putten, to the effect that he was accommodating a "buyer" that turned out to be a Government agent, with a "buy" supplied by a "source" which was allegedly the defendant-appellant, Davila, is sufficiently set forth in the direct testimony of the defendant, Van Putten, as his excuse for and reason for having in his possession the illegal drugs in question.

On the other hand, the defendant-appellant admittedly was seeking a so-called "snort" or "spoonful" for his own personal use, together with his brother, and thereby accommodated or did the defendant Van Putten a favor to drive him to the place of rendezvous with the Government agent. This also is set forth in the testimony of the defendant-appellant, Davila. (T162-164)

The defendant-appellant confirms his involvement with hospital confinements for his physical affliction which was contracted while in the Service, and required continual, prolonged hospitalization. The last of these confinements, prior to the date in question in the indictment, was in the very period which the Government's witness is allegedly to have had dealings with the defendant-appellant, and Mr. Davila's testimony concerning this is found at T155ff.

Finally, in his charge the trial judge points out to the jury the question of the credibility of the witnesses, and more particularly the question of the accomplice-witness' testimony. (A38-39).

With respect to accomplice testimony, it has been held that although an accomplice's uncorroborated testimony is sufficient to support a conviction in a Federal court, an accomplice's testimony is to be received with care and suspicion and a cautionary instruction to this effect to the jury is desirable. (U.S. v. Curry, 471 F.2d 419). In the case at bar, not only did the judge's charge gloss casually over the caution to be given to the accomplice's testimony, but in fact, at the request of the counsel for the

Government, the trial judge repeated and reiterated in the charge a further instruction with respect to accomplice testimony re-emphasizing that a person can be convicted on the uncorraborated testimony of an accomplice, and further that there is nothing wrong or illegal or immoral or unfair about using accomplice witnesses in trials, that very frequently the Government or the prosecution could not prove charges of crime without using persons who actually participated therein, that there is nothing unfair or wrong or obscene about accomplice testimony (T241). All of the above was repeated after the jury had been initially charged and in response to the Government's request of charge with respect to accomplice testimony to be further explained to the jury. (A43).

With respect to the weight and sufficiency of the evidence, it has been held that "probable cause" signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt, whereas "proof beyond a reasonable doubt" connotes evidence strong enough to create an abiding conviction of guilt to a moral certainty. (Coleman v. Burnett, 477 F 2d of 187.)

CONCLUSION

The verdict of conviction predicated on the uncorroborated testimony of the accomplice witness should be reversed and set aside as being insufficient in law and contrary to the weight of evidence.

Respectfully submitted,

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